S Court, U.S.

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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

GERALD FRANK PLUNK
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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HOPP

## I. QUESTIONS PRESENTED FOR REVIEW.

1. When a defendant has suffered punitive in personam forfeitures of his property under United States v. Ursery, 518 U.S. 267 (1996), can he then be placed in jeopardy of subsequent prosecution and punishment, and tried, convicted and sentenced to two life terms based on the same offenses and evidence that were the basis of the forfeitures?

2. May the government force a defendant to forego one United States Constitution Fifth Amendment protection (self-incrimination) to preserve others (double jeopardy, due process, and protection against punitive taking of property)?

3. Where the government makes a tactical decision to force a defendant to face parallel 21 U.S.C. § 841 et seq. criminal drug prosecution and forfeitures and punitive 21 U.S.C. § 881 civil forfeitures based on the same offenses, said forfeitures factually, tactically, statutorily and procedural in personam under United States v. Ursery, 518 U.S. 267 (1996), with the "purpose or effect" of punishing a defendant (Id. at n.3) and in fact punishes a defendant by forfeiting his property due to his forced decision to forego a potentially incriminating claim and defense in the punitive civil forfeitures as a result of the "Hobson's choice" presented by the government's tactical decision to "force a fight on two fronts" do the doctrines of fundamental fairness, due process and double jeopardy preclude the subsequent criminal prosecution?

4. Can the "specialized knowledge" provision of Federal Rule 702 be allowed to defeat the holding in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and should the Supreme Court grant Certiorari as to this issue for criminal procedure given that Certiorari has been granted in Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1435 (11th Cir. 1997), cert. granted sub nom. Kumho Tire Co. v. Carmichael, --- U.S. ---, 118 S.Ct. 2339, 141 L.Ed.2d 711 (1998), as to the companion issue in civil jurisprudence regarding the interplay of the Rule 702 "specialized knowledge" exception and the Daubert mandate to the trial

courts to serve as a "gatekeeper" against "junk science?"

5. Does it violate Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and the District Court's duty to serve as "gatekeeper" to protect the jury from undue influence to allow an investigating officer to testify to "junk science" under the guise of an "expert" as to his present trial-held opinion as to the purported specific meaning of alleged "code words" on wire taps and in a "drug ledger" (and by implication his opinion as to alleged defendant speaker's state of mind and criminal intent) where such an opinion has been colored and refined after debriefing of alleged co-conspirators and where such opinion has no adequate scientific basis under Daubert?

6. Does it violate due process and the right to a jury trial to refuse upon defense request a mandatory instruction that the jury must be unanimous on acquittal or conviction on a greater offense (CCE) before deliberating on a lesser offense (conspiracy)?

7. Does it violate due process, equal protection, right to counsel, rights to cross-examination and confrontation, to a jury trial, and 18 U.S.C § 201(c)(2), i.e., the Federal Bribery Statute, to allow numerous "cooperating" witnesses and alleged "co-conspirators" to testify against a criminal defendant in exchange for promises of immunity from prosecution and/or leniency so as to constitute bribery and undue influence of said witnesses by the federal government?

8. Should the Supreme Court grant Certiorari as to the issues concerning the government bribing and influencing witnesses via threats and inducements as to prosecution, immunity, and plea bargains in that the Tenth Circuit has now squarely prohibited the practice in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), rehearing en banc ordered 7/10/98?

9. Does it violate fundamental fairness and due process of law to force a defendant to forego a defense to punitive administrative forfeitures to preserve fifth amendment

privileges based upon existing law (i.e., existing case law interpretation and restrictive application of "limited use immunity" under Simmons v. United States, 390 U.S. 377 (1968), and then based upon a change in the law (i.e., United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) cert. den'd, 116 S.Ct. 2528 (1996), retroactively deny double jeopardy protection notwithstanding prior punishment?

10. As a policy and constitutional matter, should the doctrine of "limited use immunity" of Simmons, supra, as to potentially incriminating claims of ownership to convey standing in fourth amendment issues be extended to claims of ownership in civil punitive drug forfeitures?

11. If Simmons "limited use immunity" is now extended to protect admissions and claims of ownership made by a property owner and defendant for in personam punitive forfeiture proceedings under 19 U.S.C. § 1609 and 21 U.S.C. § 881, and such extension is now applied to find "voluntary abandonment," forfeiture and waiver of double jeopardy by failing to file a claim, can the extension of such implied abandonment, forfeiture and waiver be applied retroactively to Mr. Plunk and his counsel and others similarly situated who relied in good faith on the "old law" to preserve constitutional rights to their detriment?

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Petitioner, Gerald Frank Plunk, respectfully prays a Writ of Certiorari issue to review the judgment and opinion(s) herein of the United States Court of Appeals for the Ninth Circuit, filed August 28, 1998.

## IV. REFERENCE TO OPINIONS IN THE CASE.

The Judgments and Opinions as to which this Petition for Writ of Certiorari seeks review were rendered in a published opinion filed in Ninth Circuit No. 96-30363, arising from District Court of Alaska No. CR-94-0036 JWS, on August 28, 1998, which is reported at 153 F.3d 1011 (9th Cir. (Alaska) Aug. 28, 1998), and a companion unpublished memorandum opinion of said date (hereinafter "Plunk II"). (Appendix (hereinafter "App.") at 1, 44.) In prior proceedings (hereinafter "Plunk I"), the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was rendered in an unpublished memorandum opinion filed October 17, 1995 in Ninth Circuit Nos. 94-30421 and 94-30422, 1995 WL 619299, cert. den'd, 517 U.S. 1188 (1996). App. 47. The Honorable John W. Sedwick's unpublished findings and conclusions were entered November 17, 1994 and August 5, 1996 in United States District Court Alaska Case No. CR-94-036-01 (JWS). App. 53, 138. United States Magistrate John D. Roberts' Recommendations were entered November 4, 1994 and July 23, 1996 in No. CR-94-036-01 (JWS). App. 65, 138.

## V. GROUNDS FOR JURISDICTION/TIMELINESS OF PETITION FOR WRIT OF CERTIORARI.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1254. A timely Ninth Circuit extension of time set the date for filing a Petition for Rehearing at September 25, 1998. Applications for leave to file one day out of time (due to weather delay in transmitting documents from Alaska to San Francisco) and for permission to file a Consolidated Overlength Petition for Rehearing and Suggestion for Appropriateness of Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit were

filed on September 28, 1998. A Consolidated Petition for Rehearing and Suggestion for Appropriateness of Rehearing *En Banc* was transmitted to and/or lodged and/or filed with the United States Court of Appeals on September 25, 1998 and/or September 28, 1998. On October 16, 1998 a Motion for Order Effective Nunc Pro Tunc as of 9/25/98 Granting One Day Extension of Time in Which to File Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was filed and is pending. Counsel is awaiting action concerning same and has sought clarification and/or relief from the Ninth Circuit Court of Appeals and/or clarification and/or relief via extension of time from a single Justice of the United States Supreme Court (Justice Sandra Day O'Connor) concerning the time for filing a Petition for Writ of Certiorari under U.S. Supreme Court Rule 13. The procedural issues and issues as to the time for filing this Petition for Writ of Certiorari and pending Ninth Circuit motions are set out in the Application to Justice O'Connor which was filed on November 16, 1998 and denied on November 20, 1998.

No mandate by the Ninth Circuit has issued.

Out of an abundance of caution, the instant Petition for Writ of Certiorari is being filed timely at the present time to moot and/or prevent or foreclose any jurisdictional issue as to seeking Certiorari since it is being filed by mail within 90 days after the entry of judgment for the opinions as to which Certiorari is sought, and the Supreme Court is requested to defer action on the instant Petition for Writ of Certiorari pending final decision by the Ninth Circuit Court of Appeals concerning the referenced motions and Consolidated Petition for Rehearing and Suggestion for Appropriateness of Rehearing *En Banc* and, if appropriate, to treat this Petition at this juncture as a Petition under Supreme Court Rule 11.

## VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Fifth Amendment (double jeopardy due process and self-incrimination clauses) of the United States Constitution. It also involves the Sixth Amendment to

the United States Constitution (right to counsel, confrontation and cross-examination, and to a jury trial), the Fourteenth Amendment to the United States Constitution (due process and equal protection), 18 U.S.C. § 201(c)(2), 19 U.S.C. § 1609, 21 U.S.C. § 841, et seq., and 21 U.S.C. § 881, et seq., and Federal Rules of Evidence 702, 703 and 704. App. 152-181.

## VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

This petition seeks review of the Ninth Circuit's published and memorandum opinions in United States v. Plunk, Cause No. 96-30363, 153 F.3d 1011 (9th Cir. (Alaska) Aug. 28, 1998), which were rendered on direct appeal by Mr. Plunk from a criminal judgment of conviction and sentence in United States v. Plunk, District Court of Alaska of CR-94-0036 (JWS). Jurisdiction for the court in the first instance was based upon indictment and/or conviction for alleged violations of the United States Code including 21 U.S.C. § 841(a)(1), 21 U.S.C. § 843(b), 21 U.S.C. § 846, 21 U.S.C. § 848 and 21 U.S.C. § 853.

### A. Relevant Facts and Proceedings.

Mr. Plunk is serving life terms for two convictions of 21 §§ 841(a)(1) and 846 offenses (distributing and conspiracy to distribute cocaine) which were the basis for four prior in personam punitive forfeiture(s) of his property within the holding of United States v. Ursery, 518 U.S. 267 (1996).

Criminal search and arrest warrants resulted in the search of Mr. Plunk's home and his physical arrest. Items taken from the home at the search and a watch stripped from his person at the arrest were the subject of four in personam administrative forfeitures which constituted punishment and were based on the same probable cause and offenses for which he was subsequently tried, convicted and sentenced. Due to the tactical decision to institute parallel in personam punitive forfeitures and a criminal indictment for the same alleged offenses, including a criminal 21 U.S.C. § 848 and/or

§ 853 forfeiture count, Mr. Plunk and his counsel were faced with a "Hobson's choice," i.e., "faced a battle on two fronts" and thus were forced to preserve Mr. Plunk's fifth amendment privileges by foregoing a formal claim of ownership or defense to the in personam punitive administrative forfeitures. At the time of such forced decision (to wit: preserving one basic constitutional right (self-incrimination) by foregoing others (due process and right to be free from punitive forfeiture and punishment), no ruling of the United States Supreme Court or the circuits had authorized any type of "limited use immunity" under the doctrine of Simmons v. United States, 390 U.S. 377 (1968), as to potentially incriminating claims of ownership made by a property owner and defendant in punitive forfeiture proceedings under 19 U.S.C. § 1609 and 21 U.S.C. § 881. In fact, the case law was to the contrary.

Substantial portions of the government's prosecution were initially dismissed by the United States District Court on double jeopardy grounds due to said punitive in personam forfeitures.

After such partially successful jeopardy challenges, and cross interlocutory appeals by the defendant and the government, a Ninth Circuit panel, in the previously unpublished opinion in the instant case entitled United States v. Plunk, No. 94-30421 and 94-30422, 95 WL 619299 (9th Cir. October 17, 1995), cert. den'd 517 U.S. 1188 (1996) (hereinafter "Plunk I"), applied United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), cert. den'd 116 S.Ct. 2528 (1996), and held that Mr. Plunk had not been "punished" since he had impliedly "abandoned" the property in the face of a punitive forfeiture due to the failure to file a claim. The Plunk I court avoided the "Hobson's choice" issue.

That is, in Plunk I, prior to the Supreme Court's decision in United States v. Ursery, supra, the Ninth Circuit reversed the District Court's grant of a double jeopardy bar, holding that under United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), cert. den'd 116 S.Ct. 2528 (1996), Mr. Plunk had "abandoned" the property and thus had not suffered

punishment or been placed in jeopardy notwithstanding the fact that no court had ruled pre-Cretacci that Simmons limited use immunity extended to a claim of ownership or defense in the forfeiture action.

In the instant matter, reported as United States v. Plunk, 153 F.3d 1011 (9th Cir. (Alaska) Aug. 28, 1998) (hereinafter "Plunk II"), the Ninth Circuit then refused to interpret or apply the United States Supreme Court ruling in United States v. Ursery, 518 U.S. 267 (1996), notwithstanding the fact that Mr. Plunk pointed out to the Ninth Circuit, and the record demonstrates, that "factually, tactically, statutorily and procedurally, the subject administrative forfeitures...were in fact in personam criminal forfeitures tactically directed at [Mr. Plunk] to punish him," so as to fall within the Court's holding at n.3 of Ursery that such forfeitures gave rise to a double jeopardy bar and afford protection against subsequent prosecution and punishment. United States v. Plunk, 153 F.3d 1011, 1029-1030.

In Plunk II, the Ninth Circuit refused to address the punitive versus remedial aspects of the forfeitures and the resulting double jeopardy protection afforded under Ursery and the "implications" of the "tactical" choice of the government to present the defendant with the "Hobson's choice" by "forcing a fight on two fronts" by ignoring the Ursery decision, incorrectly holding that it was not new or intervening United States Supreme Court precedent, and claiming the law of the case (i.e., the Cretacci "waiver" or "abandonment" holding) precluded such analysis.

The Supreme Court should exercise its authority and hold squarely that in light of Ursery, given the importance of the "Hobson's choice" and "fight on two fronts" issues as they impinge on the fifth amendment protection against self-incrimination, that where there was no prior notice to counsel or to the defendant that "Simmons use immunity" would be honored, in fact the defendant or his counsel did not "knowingly" or "voluntarily" waive or abandon his due process or double jeopardy rights and thus Mr. Plunk is protected from subsequent prosecution or punishment by

double jeopardy given the prior punishment he suffered.

In a trial fraught with numerous errors, the government's evidence was based on: (1) seven cooperating alleged co-conspirators testifying under grants of immunity and/or pursuant to plea bargains or downward departure agreements to escape significant punishment (including mandatory life terms); and (2) in addition to the testimony of such witnesses who were being "bribed" and/or "threatened" and unduly influenced in violation of 18 U.S.C. § 201(c)(2), the Federal Bribery Statute, and the United States constitution,[1] the improper and unsubstantiated "junk science" and "expert opinion" testimony of an investigating officer, Detective Speziale, which violated Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Based on a purported Evidence Rule 702 "specialized knowledge" exception, such unsupported and unscientific "expert opinion" was given to the jury in derogation of the duty of the trial court under Daubert to serve as a "gatekeeper" against "junk science."

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[1] The Tenth Circuit in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), has granted hearing en banc from a panel decision that 18 U.S.C. § 201(c)(2), the Federal Bribery Statute, precludes the government from inducing testimony against co-defendants and/or alleged co-conspirators via promises of immunity and other favorable treatment. Mr. Plunk moved timely in a pretrial fashion to preclude such testimony, alleging it violated rights to due process, equal protection, to counsel, and to a jury trial. App. at 145. He further appealed to the Ninth Circuit on the grounds that the failure to allow a defense expert or to properly instruct the jury as to the motive for bias of such cooperating witnesses was constitutional error. Memorandum Op. at 2; App. 45. While the Federal Bribery Statute, 18 U.S.C. 202(e)(2), addressed in Singleton was not specifically relied on in the Ninth Circuit appeal in Plunk II, application will be made in a Supplemental Petition for Rehearing to the Ninth Circuit to specifically address said issue (which should be viewed as adequately raised and encompassed in Mr. Plunk's District Court pretrial motions and Ninth Circuit appeals) to further perfect (if necessary) the issue for review by this Court and/or for habeas relief if not previously resolved.

Over strenuous trial objections and a pretrial motion in limine (App. 123), a New York narcotics officer, Detective Speziale, was allowed to testify as a purported "expert" and testify as to "junk science," i.e., his case-specific "expert opinion" as to alleged precise criminal meanings of "code words" he claimed were recorded statements by Mr. Plunk on the wiretaps, as oral criminal acts of criminal intent of defendant Plunk, notwithstanding an insufficient showing under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), of a basis for scientific knowledge.[2]

When the jury, during deliberations, requested clarification between the conspiracy and CCE counts, counsel specifically requested a transition instruction, as mandatory under Ninth Circuit law, requiring conviction or acquittal on the greater (CCE) before deliberations on the lesser. App. 127. This was refused. App. 133.

After trial, having lost via a judgment of acquittal as to certain portions of Mr. Plunk's property on the criminal forfeiture count under the indictment, the government proceeded to obtain civil in personam punitive forfeiture of the same property, i.e., several of Mr. Plunk's airplanes and substantial pieces of real property. Again, counsel and Mr. Plunk were faced with the "Hobson's choice" due to the parallel and sequential prosecutions and Mr. Plunk's pending appeal, and the government resisted a request for stay, the court refused to grant same, and the court held that Mr.

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[2] The District Court and Ninth Circuit allowed such improper expert opinion testimony as "specialized knowledge" under Rule 702 despite the defendant's argument that such an exception emasculates and distorts the "gatekeeper" duty and function of the court to guard the jury from "junk science" under Daubert. The Supreme Court has granted Certiorari as to such issues in Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997), cert. granted sub nom. Kumho Tire Co. v. Carmichael, — U.S. ---, 118 S.Ct. 2339, 141 L.Ed.2d 711 (1998), as to civil jurisprudence, and should do likewise in this case as to the even more important aspects of criminal procedure and trials where a citizen's liberty (as opposed to mere property) is at stake and threatened by "junk science."

Plunk's assertion of his fifth amendment privileges meant that he failed to refute a showing of probable cause in the subsequent civil forfeiture actions and that forfeitures should issue.

Accordingly, based on the same criminal offenses, allegations and evidence, Mr. Plunk has been subjected to four initial in personam punitive forfeitures of property seized from his person and his house, a criminal trial with conviction and two life sentences, and after a defense judgment of acquittal as to forfeiture, two subsequent post-verdict punitive in personam forfeitures of numerous airplanes and pieces of real property, and has never had an opportunity to defend himself free from such a "Hobson's choice."

Thus, the instant conviction, forfeitures and sentence were obtained in total violation of due process, double jeopardy, the fifth, sixth and fourteenth amendments, Evidence Rule 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

## VIII. REASONS FOR GRANTING CERTIORARI.

### A. It Violates Fundamental Fairness, Due Process, the Right to Remain Silent and the Right Against Double Jeopardy to Force a Criminal Defendant to Give up Certain Fifth Amendment Constitutional Rights (Double Jeopardy and Due Process Rights to be Free From Forfeiture of One's Property) in Order to Preserve Another (Right Against Self-Incrimination).

There is no question but that the record demonstrates the government made a tactical choice to seek punitive in personam punitive civil forfeitures against Mr. Plunk and his property at the time he was facing a criminal indictment so as to present him and his counsel with a "Hobson's choice" and "force a fight on two fronts." The foundation of the fifth amendment prohibition against such a government tactic and such parallel or successive prosecutions which are barred by double jeopardy traces its origins to Greek and Roman law. See United States v. $405,089.23 in U.S. Currency, 33 F.3d

1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995), reversed sub. nom. United States v. Ursery, 116 S.Ct. 2135 (1996).

The record clearly demonstrates that from the outset Mr. Plunk has been the subject of in personam forfeitures and penalties within the meaning of the United States Supreme Court's ruling in United States v. Ursery, supra.

The Ursery Court made two unequivocal statements in its holding, namely that: (1) forfeiture penalties which are "punitive" in "purpose or effect" are in personam and are distinct from in rem civil forfeitures which are purely remedial," and accordingly, such in personam punitive actions give rise to a double jeopardy bar; and (2) that even some nominally "in rem" civil forfeitures would constitute "punishment" within the meaning of the double jeopardy clause bar to further prosecution, "where the 'clearest proof' indicates that an in rem civil forfeiture is so punitive either in purpose or effect' as to be equivalent to a criminal proceeding...." Ursery at 2148, n.3.

While the panel's opinion in Plunk II recognized this language from Ursery at 153 F.3d 1030 and acknowledged these two clear teachings of Ursery, the court refused to rule on Mr. Plunk's argument that "factually, tactically, statutorily, and procedurally, the subject administrative forfeitures...were in fact in personam criminal forfeitures tactically directed at [him] to punish him." Plunk II Opinion at 153 F.3d 1030. The panel in Plunk II improperly held at 153 F.3d 1029 that consideration of Mr. Plunk's Ursery double jeopardy claims were barred by the decision in United States v. Plunk, Nos. 94-20421, 94-30422 and 1995 WL 619299 (9th Cir. Oct. 17, 1995), cert. denied 517 U.S. 1188 (1996) (Plunk I), wherein the court had mistakenly found that under United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), cert. denied, 116 S.Ct. 2528 (1996), Mr. Plunk's coerced decision to forego filing an administrative claim and contesting the civil forfeitures to protect his fifth amendment privilege in the pending criminal case meant that the property was "abandoned," "the forfeiture of Plunk's abandoned property was not a 'punishment,' and

thus Plunk was not placed in jeopardy." Memorandum Op. at 3; App. at 49. This ruling in Plunk II is a misapplication of the law of the case doctrine, ignores the effect of Ursery on Plunk I and Cretacci, and further, overlooks material facts concerning the in personam punitive nature of the forfeitures and resulting "Hobson's choice." At the time of the court's ruling in Plunk I, the relevant law in the Ninth Circuit as to the double jeopardy implications of civil forfeitures was United States v. $405,089.23 in United States Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995), reversed sub. nom. United States v. Ursery, 116 S.Ct. 2135 (1996). In Ursery the United States Supreme Court clearly distinguished between in personam punitive forfeitures, holding that such forfeitures which were clearly "punitive" in either "purpose or effect" did invoke the double jeopardy clause as opposed to in rem civil forfeitures which were purely remedial and did not do so. The court held squarely that even civil forfeitures could be punitive and thus in personam where there was such proof of the purpose or effect, as in the instant case. See Ursery at 2148, n.3.[3]

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[3] Mr. Plunk set out in more detail to the District Court and in his briefing to the Ninth Circuit in the Plunk II appeal in both the opening brief and the reply brief that due to the reasons for and nature of the seizures (via a criminal arrest and search warrant) and the tactical reasons and purpose for same, and the manner in which the government used Title 19 U.S.C. §§ 1602-1609, 21 C.F.R. 131671-131681 and Title 21 U.S.C. § 881 to obtain the administrative forfeitures they were procedurally and substantively, in both purpose and effect, in personam criminal punitive forfeitures. The manner and purpose in which said statutes were used and the fact that the property was initially seized under criminal search and arrest warrants and the manner in which the property was administratively forfeited at the time there was a parallel criminal forfeiture action under the CCE count and the fact that the government attempted post-acquittal to institute further forfeiture actions constitute the "clearest proof" the referenced forfeitures were in fact "punitive" in both "purpose" and "effect" under Ursery. As discussed in the Plunk II briefing, they were thus in personam both substantively and procedurally and likewise were in personam attempts to punish Mr. Plunk as a successive ploy by the government to gain tactical advantage. See Discussion, infra at 13-22.

The Cretacci and Plunk I and II panels denied double jeopardy protection under the transparent subterfuge that there had been voluntary "abandonment" of the property in the punitive administrative proceedings, notwithstanding that under then-existing case law, i.e., the "limited use immunity" in Simmons afforded potentially incriminating statements and claims of ownership made to convey standing in fourth amendment suppression motions, there was no protection for a property owner claiming incriminating property in a punitive administrative forfeiture proceeding.

This patently frivolous and unsupported claim of "waiver" and "abandonment" cannot be said to be founded on any evidence of a "knowing" or "voluntary" relinquishment of any constitutional right. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 799 (1963). Via such judicial "sleight of hand" the Plunk I panel avoided the Ninth Circuit holding in United States v. $405,089.23 in U.S. Currency, supra, and now the Plunk II panel has avoided the doctrine enunciated in n.3 in Ursery that punitive in personam forfeiture conveys the protection of a jeopardy bar to subsequent prosecution or punishment.

Not only is such an extension of Simmons use immunity ill-advised in terms of policy considerations for the courts, but it is not clear that such Simmons "limited use immunity" will in fact be afforded in the future to defendants in circuits other than the Ninth Circuit, since Cretacci was the first case to so rule and many other circuits have not yet adopted such an ill-advised, unprecedented doctrine. From a practical and policy view, many troubling questions exist as to the wisdom, scope, and application of such use immunity. Does it apply to mere use, or derivative use? What procedures apply to prevent taint to subsequent prosecutions? How does one build the proverbial "Chinese Wall" and what procedural hearings, safeguards, etc. are mandated and who has the burden of proof to show taint or lack of taint?

It is clear that not only was Mr. Plunk punished before his criminal trial by punitive in personam forfeitures of his property directed against him in a personal fashion, but he

likewise suffered such punishment after his criminal trial, while this appeal was pending, notwithstanding his criminal conviction and sentence and a successful judgment of acquittal as to the criminal forfeitures in the criminal trial.

To allow this procedure to exist means the government can continue to gain tactical advantage and inflict punishment on defendants who cannot defend themselves or their property by instituting in personam punitive forfeitures as to potentially incriminating property, secure in the knowledge that any competent defense counsel and defendant, until an acquittal or final resolution of a merit appeal, must forego making administrative forfeiture claims or interposing a defense and thus suffer forfeiture. The government can then claim "abandonment" or "waiver" and avoid the underlying teachings of Ursery.

Further, even if United States v. Cretacci, supra, is viewed as good law, Cretacci dealt with in rem remedial civil forfeitures, not in personam punitive civil forfeitures which were instituted as a tactical ploy by the government.

Where a matter is in personam as opposed to remedial civil in rem proceedings, and is thus punitive, the burden should remain on the government and never shift, and the defendant should have fifth amendment privileges and be allowed to defend himself based upon presumptions of innocence, relying on the fifth amendment privilege.

That is, a defendant must be able to stand silent and avoid self-incrimination, without an affirmative duty to incriminate himself to avoid a "waiver" or "abandonment" argument.

The basic point is that from the time the Rolex watch was gleefully taken from Mr. Plunk's wrist at his arrest by Detective Speziale under the criminal arrest warrant and the other property was taken from his house under the criminal search warrant with both the seizures and punitive in personam forfeitures based upon the probable cause and offenses encompassed by the criminal indictment and trial, the government as a tactical ploy had focused on him and his

property via in personam parallel prosecutions and punitive proceedings.

This forced him and his counsel to "fight on two fronts" and face the "Hobson's choice" of a tactical hardship, i.e., to suffer punitive forfeiture of the property or preserve his fifth amendment privileges.

There was: (1) no voluntary abandonment of the property; (2) no waiver of a double jeopardy claim; and (3) a clear "purpose and effect of punishment" under United States v. Ursery, such that the in personam focus of the forfeitures constituted double jeopardy punishment.

B. Factually, Tactically, Statutorily and Procedurally, the Forfeitures were In Personam.

In United States v. Ursery, 116 S.Ct. 2135 (1996), the Sixth Circuit was reversed in United States v. Ursery, Case No. 95-345 and the Ninth Circuit was reversed in United States v. $405, 089.23, Case No. 95-346, precisely because the administrative forfeitures at issue were "in rem civil forfeitures" and thus "neither punishment" nor criminal for purposes of the Double Jeopardy Clause." Ursery at 2149.

The decision clearly distinguished such in rem civil forfeitures as non-punitive, due to their remedial purpose, and due to the fact that they focused on punishment of the property as opposed to the person in contrast to "in personam civil or criminal penalties" citing the basic distinction recognized between "in rem civil forfeiture proceedings", which were not punitive and are characterized as remedial and against the property, and "in personam civil or criminal penalties" which are directed against a person and are punitive and thus invoke the double jeopardy clause as enunciated in United States v. One Assortment of 89 Firearms, 465 U.S. 354, (1984). The Ursery Court likewise relied on the basic distinction, as set out in the cases of One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curium) and Various Items of Personal Property v. United States, 282 U.S. 577 (1931), between in rem civil forfeiture proceedings as against the

property (remedial and non-punitive), and in personam proceedings directed against the person (punitive and thus protected by double jeopardy).

Moreover, the 9th Cir. panel at 153 F.3d 1030, conceded the Ursery court had held "even some in rem civil forfeitures could constitute 'punishment' for double jeopardy purposes," acknowledging the clear language by the Ursery court in n.3 at 518 U.S. 289 that "[w]here the 'clearest proof' indicates that an in rem civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause [citing United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)]."

Accordingly, when one recognizes that factually, tactically, statutorily, and procedurally, the subject administrative forfeitures in the instant matter, which Judge Sedwick properly found were based upon the criminal conduct resulting in Mr. Plunk's conviction, were in personam criminal forfeitures strategically directed at the person of Mr. Plunk to punish him, it follows that Mr. Plunk is entitled to the protection of the Double Jeopardy Clause precluding further punishment for same.

To realize that the administrative forfeitures in question were in fact in personam and as a tactical choice by the government were directed against Mr. Plunk to punish him, as opposed to in rem against the properties, it is necessary to recognize the following. The seizures of the property were pursuant to criminal search warrant and arrest warrant affidavits. The notices of seizures were issued as a conscious punitive tactical ploy by the government, to gain the procedural benefits of 19 U.S.C. § 1602 et seq., as to the lesser standard and shifted burden of proof, and the "Hobson's choice" presented by the resulting threat to Mr. Plunk's Fifth Amendment rights after Mr. Plunk was indicted for such underlying criminal conduct and/or contemporaneous with grand jury proceedings for same. Significantly in the criminal indictment, in the Count 2 CCE a criminal forfeiture count was alleged under 21 U.S.C. 853(a)(3) which included:

> All property constituting or derived from any proceeds obtained, directly, or indirectly, as well as any properties used, or intended to be used, in any manner or part, to facilitate the commission of controlled substance violations as well as any interest in, claims against, and property or contractual rights offering said defendants a source of influence or control over the continuing criminal enterprise, including, but not limited to, the property described below.

Said "property described below" referred to certain real property, including Mr. Plunk's house, and his personal property (including other cash seized under the search warrant). By virtue of a subsequent bill of particulars the Government specified that the property subject to the in personam 21 U.S.C. § 853 punitive forfeiture also included Mr. Plunk's airplanes.

The planes were the subject of Judge Sedwick's Judgment of Acquittal as to in personam criminal punitive forfeiture which the government appealed in Case No. A-96-30349, but then abandoned the appeal. The government then re-instituted the civil action in No. A-94-401 CV (JWS) to forfeit the planes although they had lost the in personam punitive criminal forfeiture action.

21 U.S.C. § 881 and, in particular, 21 U.S.C. § 881(d) which is the statutory authorization for the utilization of the summary administrative forfeiture proceedings of 19 U.S.C. § 1602 et seq., only applies to civil in rem (remedial) forfeiture proceedings in certain instances and criminal in personam (punitive) forfeiture proceedings under 21 U.S.C. § 853(b) and (j) in others.

Significantly, 21 U.S.C. § 881(b) provides that property would had to have been either seized under "process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime claims" or would have had to have been seized under

one of the four exceptions to the requirements of such process, namely:

> (1) the seizure is incident to an arrest or a search under a search warrant or administrative warrant or an inspection under an administrative inspection warrant;
> (2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;
> (3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
> (4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.
> In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. 21 U.S.C. § 881(b) (emphasis added.).

Clearly, the property in question for which the administrative forfeitures issued was seized under 21 U.S.C. § 881(b)(1) i.e., incident to an arrest and/or incident to the referenced search warrant as specifically found by Judge Sedwick. Accordingly, the concluding paragraph of 21 U.S.C. § 881(b) is significant, since that addresses only seizures under exceptions 881(b)(3) and (4), and not 881(b)(1) or (2), as those suitable to institute "proceedings under subsection (d) of this section", i.e. the summary forfeiture provisions of 19 U.S.C. § 1602 et seq. which were utilized herein.

Where such a 21 U.S.C. § 881(b)(1) search warrant seizure and/or seizure incident to an arrest warrant is utilized, the summary forfeiture provisions of 19 U.S.C. § 1602 et. seq. which were utilized herein, are not authorized under a 21 U.S.C. § 881 in rem forfeiture but must only be valid under 21 U.S.C. § 853(j), i.e. punitive in personam forfeiture.

That is, in contrast, 21 U.S.C. § 853(j) provides that 21 U.S.C. § 881(d) i.e. the referenced summary forfeiture administrative procedures under 19 U.S.C. § 1602, which were utilized, apply "to a criminal forfeiture under this section" and there is no such restriction concerning the manner and means of seizure. While 21 U.S.C. § 853(f) does allow the Government to "request the issuance of a warrant authorizing the seizure of property subject to forfeiture" it appears from the statutory scheme that where property is in fact seized pursuant to an arrest under an arrest warrant or a criminal search warrant that the utilization of the 21 U.S.C. § 881(d) incorporation of 19 U.S.C. § 1602 et seq. administrative forfeiture procedures is obviously as criminal in personam forfeiture under 21 U.S.C. § 853(j) as opposed to civil in rem forfeiture.

Thus, since the seizures in question were clearly without the requisite process issued by the United States District Court under the Supplemental Rules for Certain Admiralty Maritime Claims, and were obviously seized under subsection 881(b)(1), to wit seized incident to an arrest under an arrest warrant and/or incident to a search warrant in a criminal proceeding, the 19 U.S.C. § 1602, et seq. administrative forfeiture actions cannot be characterized as §§ 881(b)(1) and 881(d) in rem actions against the property, i.e. remedial and non-punitive, but are clearly §§ 853(j) and 881(d) in personam actions against the criminal defendant/owner and thus are punitive and invoke the protection of the double jeopardy clause.

That is the summary forfeiture positions utilized herein of 19 U.S.C. § 1602 et. seq. were not instituted or authorized under 21 U.S.C. § 881 civil in rem forfeiture since there was no Admiralty/Maritime process issued, the seizures were under a criminal search warrant and/or pursuant to an arrest under a criminal search warrant which meant that the basis for utilizing such summary forfeiture procedures were under 18 U.S.C. § 853(j), i.e. in personam punishment via punitive forfeiture.

Moreover as a matter of constitutional due process, this result is mandated.

Having begun criminal search warrant/arrest warrant proceedings against Mr. Plunk, having indicted him, and in light of the interplay between the fifth amendment rights and the forfeitures, and the resulting "Hobson's Choice", as a matter of basic due process it is clear that the forfeitures in question were in personam punitive forfeitures under 18 U.S.C. § 853(j) and 881(d) and not in rem remedial forfeitures under 21 U.S.C. § 881(b) and (d), which purpose and effect was to punish Mr. Plunk. In essence the government "severed" for tactical purposes, portions of the forfeiture counts from the indictment and proceeded by way of administrative in personam punitive forfeiture, and summary adjudication, and thus the government is bound by the double jeopardy bar.

It is thus crucial to recognize the important substantive distinguishing factor of Mr. Plunk's case from that of Ursery or $405.089.23 United States Currency. The pre Cretacci unavailability of "Simmons" use immunity for statements and claims of ownership in forfeiture proceedings forced Mr. Plunk to forego the administrative claims precisely due to concerns of jeopardizing his fifth amendment and self-incrimination rights. In Ursery, no such Hobson's choice was procedurally present, since the civil forfeiture proceedings were instituted prior to arrest and indictment. Likewise in $405,089.23 United States Currency, no such Hobson's choice was present, since the forfeiture proceedings were instituted after conviction. Here, it is the very nature of the tactical decision by the prosecution, to wit to institute administrative in personam punitive forfeiture proceedings in the midst of the criminal prosecution that presented said Hobson's choice. In turn this is precisely why the prosecution should suffer a double jeopardy bar having elected to "split out" some property covered by the 21 U.S.C. § 853(a) forfeiture count in the indictment into 21 U.S.C. § 853(j) administrative in personam punitive forfeiture proceedings. Clearly the reality, factually, procedurally, legally, and equitably, is that the forfeiture actions were in

personam against Mr. Plunk as the owner of the property to punish him.

This statutory distinction, including the distinction as set out in 21 U.S.C. 881(b), i.e. that the utilization of the summary administrative forfeiture procedures of 19 U.S.C. § 1602 are only authorized under 21 U.S. C. § 853(j) wherein it utilizes 21 U.S.C. § 881(d) for property that has been seized under a criminal search warrant and/or arrest, and thus said forfeitures must be characterized as in personam punitive forfeitures, with attendant double jeopardy consequences, as opposed to property seized under civil process or otherwise, and not such criminal process, which property may be subject to 19 U.S.C. § 1602 summary forfeiture administrative procedures utilizing 21 U.S.C. § 881(b) and (d) and thus characterized as in rem remedial forfeitures, with non-double jeopardy consequences, has a sound constitutional, public policy, and statutory basis.

That is, the very fact that the property is seized under a criminal search warrant or under an arrest pursuant to a criminal arrest warrant, as in the instant matter, has profound constitutional implications for the defendant, insofar as by virtue of the existence of probable cause as set out in the search warrant, or indictment and/or arrest warrant applications, the government has focused on the defendant in personam as a criminal defendant target, which in turn has implications for his Fifth Amendment rights should he seek to file and/or assert a formal claim of ownership for the property. Accordingly, it is entirely proper that the statutory scheme as discussed be construed such that if the government utilizes the summary forfeiture administrative procedures under 19 U.S.C. § 1602 to punish a target defendant by forfeiting property belonging to a defendant who has been arrested or indicted, with the attendant advantages to the government of standard and burden of proof, requirement of a formal claim etc., as opposed to the criminal jury trial process of 21 U.S.C. § 853(a), the government likewise should be charged with double jeopardy consequences for the in personam nature of such proceedings. It would be a constitutional and legal fiction to claim that having proceeded with a criminal search

warrant or criminal arrest warrant that the focus is "remedial", i.e., in rem against the property as opposed to "punitive", i.e., in personam against the defendant.

Of further significance is the different burden and standard of proof required in the in personam indictment's criminal forfeiture action to raise a rebuttal presumption of forfeitability, i.e. preponderance of the evidence, as opposed to the standard of proof required in administrative actions to shift the burden of proof, i.e. probable cause.

Having availed themselves of this lesser standard of proof in the administrative in personam civil forfeiture actions against the gold, guns, jewelry, and watch, and having further availed themselves of the benefit of the "Hobson's" choice to obtain summary punitive in personam forfeiture, the government must likewise suffer the burden, namely, the double jeopardy bar. In short, once the criminal search warrant was obtained, the indictment was obtained, the arrest was made, and the seizures were pursuant to same, the forfeitures in question were clearly in personam punitive forfeitures against Mr. Plunk to punish him and not in rem remedial actions against the property. Having successfully obtained such in personam punitive administrative forfeitures of certain of the property due to its tactical procedural ploy of severing the in personam forfeiture counts as to said property by the utilization of 21 U.S.C. § 853(j) to institute and obtain 19 U.S.C. § 1602 et seq. administrative forfeitures, the government is likewise saddled with the burdens of its success, i.e. the double jeopardy bar.

Concurrently, having failed in the in personam indictment forfeiture counts against the remaining property, i.e. the real property, airplanes, etc. it may be that although the government may continue to seek such in rem remedial forfeiture under Admiralty/Maritime civil process in 21 U.S.C. § 881 in rem actions with a different standard of proof, burden of proof, etc., the government may not continue to seek actual in personam punishment against Mr. Plunk by virtue of continued criminal prosecution and incarceration.

The government may well now regret its choice and its hollow success in obtaining in personam punitive forfeiture and punishment of Mr. Plunk by virtue of such administrative forfeitures but it is nonetheless chargeable with same and a double jeopardy bar applies.

In conclusion it is clear, both factually and strategically, due to the purpose and nature of the seizures, the basis for the seizures, the timing of the indictment, seizures, notices and forfeitures, and procedurally and statutorily that the administrative forfeitures in question were a tactical choice by the government under 21 U.S.C. § 853(j), incorporating the provisions of 21 U.S.C. § 881(d), in turn incorporating the provisions of 19 U.S.C. § 602 et seq. and as such were in personam criminal punitive forfeitures.

Since Judge Sedwick properly found that the crimes on which they were based included Counts 1 and 11, and further the Alaska I Conspiracy charged in the initial indictment, and moreover, since portions of said counts in turn were lessor included offenses/elements of the CCE and phone counts, not only are the instant convictions before the Court jeopardy barred, but likewise the counts as to which the jury was unable to return a verdict are likewise jeopardy barred.

In short, the situation is significantly different from United States v. Ursery and United States v. $405,089.23 which is a narrow holding based upon civil in rem actions against the property, as opposed to in personam punitive actions against a person.

The recent United States Supreme Court decision in Hudson v. United States, 118 S.Ct. 488 (1997), applying the two prong test under United States v. Ward, 448 U.S. 242, 248-249 (1980) makes it clear that the multiple, parallel and successive, separate administrative and judicial forfeitures, used as a prosecution tactic by the government, to force Mr. Plunk and his counsel to defend on more than one front, renders the forfeiture proceedings criminal in character and nature requiring that he forfeitures and criminal charges be

brought in the one and same indictment as a matter of due process of law. Hudson does hold that for forfeiture actions that are actually civil in nature, the sanctions imposed do not constitute punishment for double jeopardy purposes. If the forfeiture action is criminal, however, under the Ward test, then 21 U.S.C. § 853 and 21 U.S.C. § 881 must be considered in relation to each other and "considered in relation to the statute on its face" Hudson, 118 S.Ct. 488, 493.

Applying the first prong of the Ward test, it is apparent that 21 U.S.C. § 853 (a) provides for criminal forfeiture and 21 U.S.C. § 853 (c) and (n) provides for civil in rem forfeiture of third party interests in property. Once a criminal indictment has been filed and is pending against an accused for the same underlying drug-related offense, 21 U.S.C. § 853 is controlling over 21 U.S.C. § 881. The controlling question is whether the accused in the criminal indictment is also the owner of the property subject to forfeiture. When this is the case, the forfeiture action is criminal within the meaning of 21 U.S.C. § 853 and 21 U.S.C. § 881. Once the indictment is filed and pending, 21 U.S.C. § 853 pre-empted any other administrative or judicial forfeiture proceeding predicated upon the same drug-related offenses alleged in the indictment.

The "bottom line" is that the government, having made its initial decision to proceed by way of in personam forfeiture of Mr. Plunk's property seized from his person and his home under a criminal arrest warrant and criminal search warrant so as to gain a procedural benefit and tactical advantage via the "fight on two fronts" and the resulting "Hobson's choice," and having obtained its "first bite at the apple" (in personam forfeitures and punishment) is now precluded by the double jeopardy clause from seeking any further criminal prosecution or punishment of Mr. Plunk, having in retrospect decided that the "first bite" was not sufficient.

C. Detective Speziale's Testimony as an "Expert" to his Trial-Held Opinion and Interpretation of the Alleged Meaning of the Precise Words on the Tapes and in the "Drug Ledger" (and the Mental State and Intent of the Defendant) was Improper "Junk Science" and a Violation of the District Court's Duty and Function Under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), to Serve as a "Gatekeeper" Protect the Jury from Exposure to Such Misleading "Opinion Evidence" with no Scientific Basis.

There clearly was no basis for Detective Speziale to qualify as an expert to render a scientific opinion under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and the panel's finding that he was an "alternative expert" in the field of "specialized knowledge" under Rule 702 may not be used to emasculate the Daubert ruling.

As the panel opinion in Plunk II conceded at 153 F.3d 1011 at 1019 of the Opinion, his testimony was not harmless error and in fact was significant in the jury's mind.[4]

> The decoded words and phrases provided by Speziale's testimony carried tremendous probative value; .... [Opinion in Plunk II at 153 F.3d at 1019; emphasis added.]

To allow such an "expert" to present such "junk science" as an "expert" abrogates the duty and function of the trial court under Daubert to serve as a "gatekeeper" to protect the jury from such improper and non-scientific evidence.

This Court has recognized the threat to Daubert presented by the "specialized knowledge" Rule 702 exception in the civil litigation context by granting Certiorari in the pending matter of Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 19978), cert. granted sub nom. Kumho Tire Co. v.

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[4] Note that the jury hung or acquitted on other counts, notwithstanding the testimony of seven cooperating witnesses who had deals with the prosecution, and only convicted on the counts relating to the wire tap words.

Carmichael, --- U.S. ---, 118 S.Ct. 2339, 141 L.Ed.2d 711 (1998). Obviously, where liberty is at stake as in the instant matter, the implication from such a threat to the integrity of criminal jury fact finding and procedure are even more important and frightening and thus cry out for a grant of Certiorari and reversal.

1. There is a Clear Distinction Between Allowing Testimony to Experience and Observations as "Specialized Knowledge" and Allowing "Opinion" of a "Scientific Expert"; Det. Speziale was Improperly Qualified as an Expert and his Testimony Misled and Prejudiced the Jury.

While recognizing Daubert would not allow this testimony, the panel held Det. Speziale could testify as an expert with "specialized knowledge." (Opinion at 153 F.3d at 1017.)

The most Det. Speziale should have been allowed to testify to was that his experience in such field of "specialized knowledge" included encounters with criminal practices (use of words) that are "consistent with" the referenced code words and he should not have been allowed to testify that his trial-held "expert" opinion (which was colored by post-arrest debriefing of co-conspirators) was that the words in fact were of criminal activity so as to testify by implication as to an opinion of the defendant-speaker's criminal state of mind in violation of Evidence Rule 704(a).

As to the panel's reliance on the "specialized knowledge" portions of the evidence rule, the panel failed to recognize a distinction between allowing testimony as to prior experience of specialized knowledge, i.e., that the code words were allegedly consistent with same, so as to allow a jury to make the determination, which is allowed under United States v. Bailey, 607 F.2d 237 (9th Cir. 1979), while disallowing questions as to a trial-held "expert" opinion as to alleged case-specific criminal meaning of specific alleged code words used by the defendant and thus by implication defendant's state of mind and criminal intent, which is not proper.

The testimony of Det. Speziale of his trial-held opinion as to alleged code words on the tapes and as to the meaning of a purported "drug ledger" found in the search of an alleged co-conspirator's apartment, and in particular allowing him to be called as a "expert" and to give his personal opinion that said words were highly incriminating and constituted specific oral acts of conspiracy in aiding and abetting distribution, and further, evidence of drug transactions, invaded the providence of the jury. Moreover, the panel incorrectly rejected the defendant's claim that Evidence Rule 704(a) as interpreted in United States v. Morales, 108 F.3d 1031 (9th Cir. 1997; en banc) precluded such testimony as to the mental state of Mr. Plunk, to wit: what his intent was at the time of allegedly using the words in question. Opinion at 153 F.3d at 1018. Without question, his testimony would not have withstood muster under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The panel overlooked material facts and issues of law in holding that Speziale's testimony "constitutes specialized knowledge of law enforcement, not scientific knowledge." Opinion at 153 F.3d at 1017. (Quoting United States v. Webb, 115 F.3d 711, 716 (9th Cir. 1997), cert. denied, 118 S.Ct. 429 (1997). In United States v. Jones, 24 F.3d 1177, 1179-80 (9th Cir. 1994), the court applied the Daubert standard to pre-offered expert voice identification testimony by a defense expert in a criminal case. In the present opinion, the attempt to apply the "more traditional" and in fact more liberal Rule 702 analysis of "specialized knowledge of law enforcement" as opposed to expert testimony is misguided and inaccurate. Opinion at 153 F.3d at 1017. The panel cites six cases from other federal circuits applying the Rule 702 analysis to testimony regarding the jargon and code of the drug trade and determined that such was a proper subject for expert opinion. Three of those cases were decided prior to the Supreme Court's decision in Daubert. The Fifth Circuit applied the Daubert analysis in determining the admissibility of the "specialized knowledge" evidence.

2. Given this Court's Grant of Certiorari in Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997), cert. granted sub nom. Kumho Tire Co. v. Carmichael, --- U.S. ---, 118 S.Ct. 2339, 141 L.Ed.2d 711 (1998), and its Concern for Potential Harm to Civil Jury Fact Finding by Allowing "Junk Science" to be Cast as "Specialized Knowledge," There is an Even Higher Duty to Protect Criminal Jury Procedure that Affects Liberty as Opposed to Mere Property Interests.

To allow police officers in the "highly competitive business of ferreting out crime," c.f. Johnson v. United States, 333 U.S. 10, 14 (1948), to express their "expert opinions" based on such "junk science" as opposed to merely relating their experience as "specialized knowledge," places any defendant at the mercy of such an "expert" with no real ability to cross-examine or test (or rebut) the "scientific basis" of his opinion.

If the Supreme Court allows the Ninth Circuit and other circuits to hold that the Daubert analysis is inapplicable to a drug agent's self-serving opinion as to the meaning of alleged code words, such testimony will routinely be admitted into evidence. This will emasculate Daubert and Rules 702, 703 and 704. See United States v. Boissoneault, 926 F.2d 230, 232 (2d Cir. 1992). This testimony masquerading as "expert" testimony, as in the instant case, would come in subject to none of the safeguards which are necessary in light of the Supreme Court's teachings of Daubert that there must be an appropriate "standard of evidentiary reliability," i.e., that the court must serve as a "gatekeeper" of the evidence.

As is apparent from other cases dealing with this type of testimony, alleged codes and jargon of the drug trade vary widely. See United States v. Griffith, 118 F.3d 318, 321 (5th Cir. 1997) (innocuous words used to refer to drug and various aspects of the drug trade), and United States v. Delpit, 94 F.3d 1134, 1144-45 (8th Cir. 1996) (form of "pig Latin" used to conduct business in the drug trade). There is no standard code used by drug dealers and it is obviously impossible to test the method of interpretation or "expertise" in

the area or to determine the rate of error in the expert's techniques or even in his purported foundation for an opinion. In Mr. Plunk's case in particular, the only criteria required was Det. Speziale's assurances that his opinions (which, in point of fact, were formed after he debriefed co-conspirators) were accurate. The Supreme Court's charge to the courts to serve as a "gatekeeper" of the evidence will be nullified and this type of exception, to wit, the "special expertise exception," will swallow the rule.

This Court has granted Certiorari on a similar issue in Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997), cert. granted sub nom. Kumho Tire Co. v. Carmichael, --- U.S. ---, 118 S.Ct. 2339, 141 L.Ed.2d 711 (1998), now pending before the Court. How can the Court grant Certiorari to prevent potential abuse and injustice as to civil process dealing with property and not grant at least equal concern to the criminal jury trial procedure where the basic rights to freedom and liberty are at stake—including a mandatory life sentence with no parole?

D. It Violated Due Process and the Right to a Jury Trial to Fail to Give a Proper Mandatory Transition Instruction Upon Defendant's Request.

The jury hung on the CCE count and accordingly would not have convicted on the conspiracy count if they had been instructed that they must be unanimous on the acquittal or conviction of the greater (CCE) before deliberating on the lesser. Repeated and vociferous requests were made for such an instruction once the jury asked for guidance in the area. This violated the basic teachings of United States v. Jackson, 726 F.2d 1466 (9th Cir. 1984), and United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978).

E. The Court Should Rule Squarely that it Violates Due Process, Confrontation and Cross-Examination, Equal Protection, the Right to a Jury Trial and Counsel and 18 U.S.C. 201(c)(2) to Allow the Government to Bribe and Unduly Influence Alleged Co-Conspirators and Exert Undue Influence as to Their Testimony via the Draconian Threat of Mandatory Life Sentences Versus "Plea Bargains/Immunity for Testimony."

Most of the evidence against Mr. Plunk was the testimony of cooperating alleged co-conspirators who received either immunity from prosecution or substantially reduced sentences as a part of agreements to testify against Mr. Plunk. Some received complete immunity or sentences as low as 18 months and avoided life terms. Their "deals," i.e., escaping such punishment, required that in the opinion of the government they "testify truthfully," that is, implicate Mr. Plunk.

Despite specific attempts by the defense to present an expert witness (a former public defender with clear expertise in the area to testify as to the relevance to motive for bias of the mandatory minimum provisions of the United States Sentencing Guidelines and United States Code and the "escape hatch" downward departure motions or immunity deals for the alleged co-conspirators), the District Court denied such testimony and the Ninth Circuit ruled it was merely cumulative. Memorandum Op. at 2; App. at 45.

Further, specific defense requests to have the jury instructed as to considering such motive for bias were denied, although instructions were submitted under Federal Rule of Criminal Procedure 30. Id.

An appropriate pre-trial motion was filed to preclude such testimony on the grounds it violated due process, equal protection, the right to counsel and the right to a jury trial, to allow such witnesses to be induced to so testify by the government. App. at 145.

The Tenth Circuit has recently ruled in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), rehearing en banc

ordered 7/10/98, that such conduct by the government is precluded by the relevant prohibitions against bribing a witness, including 18 U.S.C. § 201(c)(2), and the court has granted rehearing en banc as to same.

Mr. Plunk substantially raised the constitutional issue by way of a written pretrial motion, and raised the defense expert witness and instruction motive for bias issue in the Ninth Circuit appeal. Moreover, via a supplemental Petition for Rehearing, the Ninth Circuit will be asked to squarely rule on the Singleton issue.

Accordingly, this Court should reach this issue, grant Certiorari, and rule that such unfair "bribery" and "undue influence" of a federal witness is illegal and unconstitutional.

The reality is that when faced with the Draconian provisions of the mandatory minimum sentences of the United States Code and the lack of sentencing discretion of federal judges under the sentencing guidelines and the might and unfettered prosecutorial discretion of the government, any witness can be forced to testify as to almost anything in order to escape a potential life sentence. It makes a mockery of the justice system to allow the government to "buy" and/or to threaten its way to testimony against a citizen such as Mr. Plunk. Further, the error is especially compounded when the government has been allowed to do so, and the jury is not allowed to hear from an expert witness as to the potential motive for bias given the effects of such deals, and further, is not appropriately instructed to consider said motive for bias.

## IX. SUMMARY AND CONCLUSION.

The forfeitures of Mr. Plunk's property were tactically, factually, statutorily and procedurally directed at him in personam, based on the same evidence and offenses for which he was facing indictment and trial, and instituted for strategic reasons so as to gain procedural advantage, "force a fight on two fronts," and present Mr. Plunk and his counsel with a "Hobson's choice."

No counsel or defendant could have anticipated the extension of Simmons "limited use immunity" to incriminating claims of ownership or defenses in forfeiture proceedings and it is patently unfair to retroactively hold wavier or abandonment. There was never any known or voluntary waiver of any constitutional rights or any abandonment of the property.

In light of Ursery, given the "purpose and effect" of the forfeitures were punitive and in personam, double jeopardy precludes the subsequent criminal prosecution and punishment of Mr. Plunk for the same offenses.

Since the United States Supreme Court has already recognized in Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997), cert. granted sub nom. Kumho Tire Co. v. Carmichael, --- U.S. ---, 118 S.Ct. 2339, 141 L.Ed.2d 711 (1998), Certiorari should be granted as to the effects in the civil arena of the "specialized knowledge" exception to the Daubert holdings, the Court should do likewise as to the instant criminal case.

Further, the government should not be allowed to "bribe" or "threaten" its way to obtaining testimony against a citizen, especially given the largely unfettered power of the government to seek and obtain life sentences for controlled substance offenses in light of the present mandatory sentencing provisions, guidelines, and lack of discretion for sentencing judges absent a downward departure motion.

The Court should grant Certiorari and reverse.

Respectfully submitted this 27th day of November, 1998.

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